NORTHERN DISTRICT OF NEW YORK
UNITED STATES DISTRICT COURT

MARIO ABATE, And ELDA ABATE, Plaintiffs, -against- CITY OF TROY, NEW YORK, and HARRY TUTUNJIAN, Defendants.	**ELECTRONICALLY FILED** **STATEMENT OF MATERIAL FACTS** 1:07-CV-1196 (GLS/RFT)

Plaintiffs, by and through their attorney David Brickman, Esq., as in for a Statement of Material Facts on the issue of the constitutionality of the Nuisance Abatement Ordinance of the Code of the City of Troy, New York, sets forth as follows:

1. The provisions of the Troy Code which are challenged are included in Chapter 205 of Part II of the Code of the City of Troy, New York (Brickman Aff. Ex. "A"). A copy of Chapter 205 is attached to the Affirmation of David Brickman, Esq. as Exhibit "A" but will be referenced hereinafter by "Troy Code" and the section number thereof.
2. Specifically Article III of Chapter 205 of the Code entitled "Mayor's Powers; Assignment of Points for Offenses" is the subject of this Motion.
3. Article III was adopted at a Regular Meeting of the Troy City Council on June 1, 2000 (Brickman Aff. Ex. "A," "B").
4. The materials in support of the law included only a "Memorandum in Support," author unknown (Brickman Aff. Ex. "C").
5. The Ordinance was approved by eight out of nine of the City Council members (Brickman Aff. Ex. "D").

6. The City Council also unanimously agreed to review the Ordinance a year after its approval, specifically on May 31, 2001 (Brickman Aff. Ex. "B," "D").

7. The Ordinance was approved by the Mayor on June 15, 2000 (Brickman Aff. Ex. "E").

8. Subsequently, according to the text of the Code and Section DL-1 of the Troy Code, entitled "Disposition of Legislation," which sets forth "a chronological listing of legislation of the City of Troy adopted since the publication of the Code" (Brickman Aff. Ex. "F") the Ordinance was added to or amended on December 5, 2002, January 2, 2003, and July 3, 2003 (Brickman Aff. Ex. "A," "F").

9. The only record of amendment in the minutes of the City Council includes that which was approved as of June 10, 2003 (Brickman Aff. Ex. "G," "H").

10. There is no record of the promised review of the Ordinance one year from the date of its original approval (Brickman Aff. Ex. "H").

11. The findings underlying the Ordinance are stated as follows:

> The Council finds that public nuisances exist in the City of Troy in the operation of certain establishments and the use and occupation of property in flagrant and persistent violation of state and local laws and ordinances, which nuisances substantially and seriously interfere with the interest of the public in enhancing the quality of life and community environment in the City, and in fostering and facilitating commerce, maintaining and improving property values, and in preserving and protecting the public health, safety, and welfare. The Council further finds that the persistence of such activities and violations is detrimental to the health, safety, and welfare of the people of the City of Troy and of the businesses thereof and the visitors thereto. It is the purpose of the Council to authorize and empower the Mayor to impose sanctions and penalties for such public nuisances, and such powers of the Mayor may be exercised either in conjunction with, or apart from, the powers contained in other laws without prejudice to the use of procedures and remedies available under such other laws. The Council further finds that the sanctions and penalties that may be imposed by the Mayor pursuant to this law constitute an additional and appropriate method of law enforcement in response to the proliferation of the above-described public nuisances. The sanctions and

> penalties are reasonable and necessary in order to protect the health and safety of the people of the City and to promote the general welfare.

Troy Code § 205-17.

12. Article III establishes a point system for establishing nuisances in the City of Troy.
13. The Ordinance groups and assigns points to various violations of the Penal Law, Alcoholic Beverage Control Law, Vehicle and Traffic Law, Tax Law, Social Services Law, Agriculture and Markets Law, or provisions of the Troy Code. Troy Code § 205-19.
14. The points are assigned for violations that occur by the conduct or omissions of any person on or around the premises, and not the property owner. Troy Code § 205-18.
15. The violations occur during "incidents," which the Code defines as "the execution of an enforcement action." Troy Code § 205-18.
16. The alleged violations need not have resulted in convictions and the City is held only to the reduced burden of proving the violation by a preponderance of the evidence. Troy Code. § 205-20.
17. The owner of the premises who is affected by the point system is not allowed a defense of lack of knowledge although the buildings targeted by the Ordinance are for the most part businesses which are open to the public. Troy Code § 205-25.
18. As a result of an accumulation of a certain number of "points" under this Ordinance, the Mayor is then empowered to order closure of the building or otherwise affect the licenses or permissions possessed by the owners of the targeted premises. Troy Code § 205-21.
19. If the Mayor arbitrarily determines that closure is warranted, the Mayor has unfettered discretion in determining the length of the closure up to a year. Troy Code § 205-26(C).

20. To the extent that the owner may establish that the alleged "nuisance" has been addressed by the owner, the Mayor may, but is not required to, vacate any Order of closure. Troy Code § 205-26(C).
21. The owner, lessor, lessee, and/or mortgagee of the building are entitled to some notice of the Mayor's intentions under the Ordinance and an opportunity for a hearing is provided for. Troy Code §§ 205-22 and -23.
22. There is no description in the Code as to the rules of evidence or before whom the hearing will be held.
23. There is no conferring of a right of confrontation; the City may prove its entire case based entirely on hearsay testimony.
24. The owner has no power to subpoena witnesses.
25. There is no provision for judicial review of any determination arising from the hearing.
26. If the Mayor issues an Order, the Order must be posted on the building and mailed to the owner and five days after such posting, the Police Department is permitted to enforce the Order. Troy Code § 205-26(A)–(B).
27. Within Part II of Chapter 205 of the Troy Code, the City of Troy has three different Ordinances which authorize the City to declare a property a nuisance: "Article I, Health Nuisances," "Article II, Abatement by Commissioner of Public Works," and "Article III, Mayor's Powers; Assignment of Points for Offenses."
28. Article I focuses on nuisances created by unsanitary conditions or unmaintained buildings. Troy Code Art. I.
29. Article II focuses on nuisances that are alleged based on crimes committed or arrests effected on targeted premises. Troy Code Art. II.

30. Article III covers both areas of nuisance described in Article I and II.

31. Article II of the Troy Code, adopted only ten years ago in 1997, defines "Public Nuisance" as:

> Any building, structure, place or premises, apartment or dwelling unit where violations of certain of the provisions of Articles 220, 221 or 230 of the Penal Law are occurring and where two or more violations of the Penal Law have resulted in two or more criminal arrests within the twelve-month period of time immediately prior to the commencement of a proceeding pursuant to § 205-14; or where two or more violations of the Penal Law have resulted in two or more criminal convictions within the thirty-six-month period immediately prior to the commencement of the proceeding pursuant to § 205-14. It shall be prima facie evidence that violations are occurring where an arrest for a violation of said sections has been made within 30 days prior to the issuance of notice pursuant to § 205-14.

Troy Code § 205-13.

32. This definition of Public Nuisance does not utilize Article III's "point system" to label the nuisance.

33. Article II requires notice to the owner requesting that the owner abate the alleged nuisance and warning the owner that failure to do so could result in padlocking of the building. Troy Code § 205-14(B).

34. Under Article II, the owner then has thirty days to abate the nuisance himself without further order from the Commissioner.

35. Then, even if the owner has not yet abated the nuisance, the Commissioner would consider steps taken in good faith by the owner or any person towards that end and could choose not to issue an order of closure. Troy Code § 205-14(C)(3).

36. This is in contrast to the provisions of Article III which do not provide for the owner's own abatement efforts after being notified of the City's concerns about his property.

37. Also in contrast to Article III, Article II specifically provides for judicial review of any order. Troy Code § 205-16.

38. In addition to this enforcement mechanism, the businesses subjected to this Ordinance are also monitored and regulated by the City's Building and Code Departments, the City's Police Department, and the State Liquor Authority, in addition to other and further agencies depending on the business of the targeted premise.

Dated: May 16, 2008

/S/

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